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In The
Supreme Court of the United States

October Term, 1970

70-93
No. ~~1420~~

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

V.

NASH-FINCH COMPANY, d/b/a JACK AND JILL
STORES, RESPONDENT.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO
THE PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF AP-
PEALS FOR THE EIGHTH CIRCUIT

NELSON, HARDING, MARCHETTI,
LEONARD & TATE
RICHARD P. NELSON AND
WILLIAM A. HARDING
300 N.S.E.A. Building
P. O. Box 82028
Lincoln, Nebraska 68501
Attorneys for Respondent

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OPINIONS BELOW

The opinion of the Court of Appeals in the instant case (Pet. App. 15-27) is not yet officially reported, but it is unofficially reported at 76 L.R.R.M. 2860 (8th Cir. 1970). In addition, the memorandum and order of the District Court (Pet. App. 30-40) are not officially reported, but are unofficially reported at 72 L.R.R.M. 2373 (D. Neb. 1969).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1966):

QUESTIONS PRESENTED

1. Whether or not the District Court correctly dismissed the Complaint of the National Labor Relations Board seeking an injunction of the State Court proceeding due to the limitations of 28 U.S.C. § 2283 (1965).

2. Whether or not the District Court had the power to issue the injunction sought by the National Labor Relations Board in light of the fact that no Complaint has been issued by the National Labor Relations Board under the provisions of the Labor Management Relations Act, as amended, concerning the factual situation in the instant case.

3. Whether or not the National Labor Relations Board stands in the same position as the United States in the instant case, thereby giving the District Court jurisdiction regardless of the provisions of 28 U.S.C. § 2283 (1965).

4. Whether or not the State Court and the state statute have invaded a field that has been preempted by Congressional legislation.

5. Whether or not the Doctrine of Federal Preemption gives the District Court independent jurisdiction in this matter regardless of the fact that the National Labor Relations Board has not invoked its jurisdiction under the Labor Management Relations Act, as amended.

STATUTES INVOLVED

The relevant Federal statutes involved in this case are 28 U.S.C. § 2283 (1965) and §§ 10 (j) and 10(1) of the Labor Management Relations Act as amended, 29

U.S.C. § 160(j) and (l) (1965), which are set out in Addendum A to this brief at p. 12. The relevant state statutes involved in this case, NEB. REV. STAT. §§ 28-812 and 28-814 (Reissue 1964), are set out in Addendum B to this brief, at p. 14.

STATEMENT

In August, 1968, the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO (hereinafter referred to as the Union), began an organizing campaign among the meat department employees of the Jack & Jill Stores of the Nash-Finch Company (hereinafter referred to as the Company) in Grand Island, Nebraska.¹ The Union demanded recognition based upon signed authorization cards in August and the Company, expressing a good faith doubt in the Union's majority status, refused to bargain and filed a petition with the National Labor Relations Board (hereinafter referred to as the Board) for an election.

On October 9, 1968, the union filed an unfair labor practice charge with the Board alleging violations by the Company of Section 8(a)(1) and (5) of the Labor Management Relations Act, as amended (hereinafter referred to as the Act). A complaint was issued by the Board and the matter was set for hearing. On April 28, 1969, a Trial Examiner for the Board found that the Company had violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union (A.12-18).² The Trial Examiner also found that the Company violated Section 8(a)(1) of the Act by suggesting that the

1 The Union had represented, for a number of years and continued to represent the meat department employees of the company's Hastings, Nebraska stores.

2 References designated "A" refer to the Appendix filed in the United States Court of Appeals for the Eighth Circuit in Case Nos. 19983 and 19993.

employees should resign from the Union and not attend Union meetings and by interrogating employees concerning the Union (A.18-25).

On September 17, 1969, the Board reversed the Trial Examiner's decision and concluded that the Company had not violated Sections 8(a)(1) and (5) of the Act by refusing to bargain with the Union,³ and that the Union had not represented a valid majority of the Company's employees when the August bargaining demand had been made. The Board did conclude that the Company had violated Section 8(a)(1) by its other actions and it issued a cease and desist order in that regard.⁴

After issuance of the Trial Examiner's decision and before issuance of the Board decision, the Union began picketing the Company's Grand Island, Nebraska stores. On May 27, 1969, the Company petitioned the District Court of Hall County, Nebraska, for injunctive relief against this picketing (A.30-34). On May 28, 1969, the State Court issued a restraining order against the Union and set the matter for hearing on June 8, 1969, regarding the issuance of that injunction (A.35-36). On June 25, 1969, the Court issued a temporary injunction enjoining: 1) anyone other than a bona fide member of the Union from picketing unless that person first subjected himself to the jurisdiction of the State Court by becoming a defendant in the State Court proceeding; 2) pickets from instigating conversations with the Com-

3 See *Nash-Finch Company d/b/a Jack and Jill Stores*, 170 N.L.R.B. No. 77, 72 L.R.R.M. 1144 (1969).

4 Pursuant to the cease and desist order of the Board, notices were posted in the Company's Grand Island stores on September 26, 1969, for the 60 consecutive days required by the Board's decision. It is uncontested that the Company has met compliance requirements for Case No. 17-CA-3697, but the case has not been closed due to a Board policy that a case should not be closed, even after compliance, if an injunction case is pending between the same parties.

pany's customers in any matter relating to the dispute; 3) anyone, other than qualifying pickets or named defendants, from picketing, handbilling or otherwise causing to be published or broadcast any information pertaining to the dispute between the Union and the Company; 4) the Union from having more than two pickets at each of the Company stores; 5) individual pickets from distributing handbills or literature pertaining to the dispute between the Company and the Union which would in any manner tend to halt or slow the movement of traffic into or out of the Company stores and 6) the Union and its pickets from doing any act in violation of the Nebraska Mass Picketing Statutes.⁵ (A.4-6).

No charges concerning the picketing or the State Court injunction have been filed by any party with the Board (A.55). Accordingly, there is no Board complaint outstanding regarding the picketing or the filing of the injunction in the State Court.

However, on August 29, 1969, the Board filed in the United States District Court for the District of Nebraska alleging that the injunction obtained by the Company in the State Court regulates and restrains peaceful picketing and that the regulation of such picketing has been preempted by the National Labor Relations Act (A.4-7). On September 5, 1969, the Board moved the District Court for a preliminary injunction seeking to restrain the Company from enforcing or attempting to enforce portions of the State Court injunction (A.37-38). On September 8, 1969, the Union moved to intervene as a party plaintiff in the action (A.39-41). Thereafter, the Company moved to dismiss the action on the ground

⁵ See NEB. REV. STAT. § 28-812, 28-814.01 and 28-814.02 (Reissue 1964). For the text of these statutes see Addendum B to this brief at page 14.

that the District Court did not have jurisdiction due to 28 U.S.C. § 2283 (1965) (A.48).

On September 26, 1969, the Honorable Robert Van Pelt, Judge of the District Court, granted the Company's Motion to Dismiss and dismissed the Board's complaint and denied the Union's Motion to Intervene on the ground that the District Court did not have jurisdiction due to the limitations of 28 U.S.C. § 2283 (1965) (hereinafter referred to as Section 2283) (Pet. App. 30-40). Thereafter, the United States Court of Appeals for the Eighth Circuit affirmed (Pet. App. 15-27), and the Board has now filed a petition seeking a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review that decision.

REASONS FOR NOT GRANTING THE WRIT

I.

The Contention of the Petitioner That the National Labor Relations Board Should Be Accorded Immunity to 28 U.S.C. § 2283 (1965) under the "United States" Exception Has Not Been Clearly Demonstrated by the Congress and the Eighth Circuit Was Therefore Correct in Affirming the District Court's Decision.

As noted by the Circuit Court, and by this Court in *Atlantic Coastline Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), the limitations of 28 U.S.C. § 2283 (1965) may not be ignored. In addition to the three statutory exceptions contained within § 2283 itself, the Petitioner now comes before this Court urging a broadening of the "United States" exception to § 2283. However, as the Circuit Court correctly noted, the intention of Congress to bestow the privileges and immunities of the Government upon agencies created by the Government must be clearly

demonstrated. See (Pet. App. 20-22); *see also* *N.L.R.B. v. Swift & Co.*, 233 F.2d 226, 232 (8th Cir. 1956).

However, the Petitioner has not indicated any clear demonstration that the Congress has ever intended to bestow the privileges and immunities of the Government upon the National Labor Relations Board. Quite the contrary, this Court has previously determined that the Board is not entitled to the same privileges and immunities as the United States. See *Nathanson v. N.L.R.B.*, 344 U.S. 25 (1952); *see also* *N.L.R.B. v. Swift & Co.*, 233 F.2d 226, 232 (8th Cir. 1956); (Pet. App. 20-22).

II.

Since the Petitioner Has Failed to Exercise Its Statutory Authority as Expressly Authorized by an Act of Congress, It Should Not Now Be Allowed to Argue That the Decision of the Circuit Court Incorrectly Allows a State Court to Intrude into an Area Which Is Arguably Preempted by That Same Act of Congress.

Section 2283 indicates that a Federal Court may not grant an injunction to State proceedings in a State Court. However, Section 2283 provides an exception to that general limitation if such an injunction proceeding is "expressly authorized by an act of Congress." See 28 U.S.C. § 2283 (1965). The Labor Management Relations Act, as amended, authorizes the Petitioner to obtain injunctions in Federal District Courts under either Section 10(j) and 10(l) of the act. See 29 U.S.C. § 160(j) and (l) (1965). However, both of these sections of the Labor Management Relations Act require the Board to issue a complaint dealing with some unfair labor practice prior to seeking the injunction in Federal Court. See *Amalgamated Clothing Workers of America*

v. *Richman Bros.*, 348 U.S. 511, 516 1955). The Board argued before both the District Court and the Circuit Court that the Complaint in Board Case No. 17-CA-3697 concerning the Company's refusal to bargain with the Union and miscellaneous unfair labor practices involving interrogation and solicitation by the Company of its employees regarding the Union, provided the complaint necessary to utilize Sections 10(j) and 10(l) of the Act. However, it is so obvious that the picketing at issue in the instant case has never been made the subject of an unfair labor practice charge, much less an unfair labor practice complaint that both the District Court and the Circuit Court rejected this argument of the Petitioner (Pet. App. 36-37; 25-27).

Accordingly, the Petitioner has now seemingly abandoned that argument before this Court in stating that this Court should grant the Writ in the instant case for the reason that this Court has not yet decided whether or not a Federal agency may enjoin state court intrusions into an area of exclusively Federal jurisdiction in cases in which the specific statutory exceptions of § 2283 are not met. See Petitioner's Brief at page 8. Of course, it is undisputed that the very statutes which arguably preempt the area for Federal jurisdiction are the same statutes that provide that a complaint must be issued prior to the time at which the Petitioner may seek an injunction in a Federal Court. Thus, simply stated, the Petitioner is urging this Court to review a case because of a Federal statute, even though the Federal agency established by that statute has not conformed with the requirements of said statute.

The Respondent urges the Court to reject this anomalous argument on the part of the Board. The point remains that if a Federal statute preempts an area for

Federal jurisdiction, then the Federal agency administering that statute must conform to the requirements of the statute before it may be heard to cry "Federal pre-emption" in a case such as this. The Congress did not authorize the Labor Board to go off around the country seeking injunctions of state court proceedings on its own initiative. Rather, the Congress gave this power to the Labor Board only after an unfair labor practice had been charged, and a complaint had been issued by the Labor Board. The area in question may have been Federally preempted by the passage of the Labor Management Relations Act, as amended, but the Labor Board was specifically restricted, by the provisions of that Act, in its power to seek injunctions in Federal Court.

Therefore, the presence of the Labor Board before this Court urging that it should be allowed to seek injunctions in Federal Court on the power of the pre-emption of the Federal statutes in the Labor Relations area, but without regard to the limitations contained in these Federal statutes on the power of the Labor Board to seek injunctions in Federal Court is anomalous to say the least.

The Labor Board may not like the restrictions on its power, but it is for the Congress, not this Court, to change those restrictions.

III.

The Petitioner Has Not Shown Why the Instant Case Involves Matters of "Manifest Administrative Importance" Which Compel the Granting of the Writ in the Instant Case.

In the third reason stated by the Petitioner for the granting of a Writ in the instant case, a broad statement

is made that the question of whether or not Section 2283 is applicable to suits brought by the National Labor Relations Board is of "manifest administrative importance." See Petitioner's Brief at page 12. The Petitioner goes on to state that the importance is found in the "significant bearing" on the relation between Federal and State Courts in labor disputes affecting Interstate Commerce. See Petitioner's Brief at page 12. However, the relationship between Federal and State Courts in all disputes affecting Interstate Commerce has long been a question, and a potential problem, as explained by this Court in *Atlantic Coastline Railroad Co v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970).

Accordingly, the argument raised by the Petitioner is not new, and the Petitioner made absolutely no attempt to explain what "manifest administrative importance" surrounds the instant case. Apparently, the only administrative importance actually involved in the instant case that is "manifest" is found in the fact that a number of administrators at the National Labor Relations Board have been attempting to get around the limitations of Section 10(j) and 10(l) of the Labor Management Relations Act and the attendant limitations of 28 U.S.C. § 2283 (1965) for some time and this matter of getting around statutory limitations is of such "manifest" importance to these administrators that they seek to bring the issue before this Court. However, the particular desires of certain administrators to escape statutory limitations placed upon them by the Congress of the United States, without more, hardly presents a matter of sufficient importance to occupy the time and attention of this Court.

CONCLUSION

For all the foregoing reasons, the Respondent urges this Court to conclude that a Writ of Certiorari should be denied.

Respectfully submitted,

NASH-FINCH COMPANY, d/b/a
JACK and JILL STORES, Respondent,

By: NELSON, HARDING, MARCHETTI,
LEONARD & TATE
RICHARD P. NELSON AND
WILLIAM A. HARDING
300 N.S.E.A. Building
P. O. Box 82028
Lincoln, Nebraska 68501

Attorneys for Respondent

DATED at Lincoln, Nebraska
this 2d day of April, 1971.

ADDENDUM A

FEDERAL STATUTES

Section 2283

28 U.S.C. § 2283 (1965)

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

LABOR MANAGEMENT RELATIONS ACT, as amended, Section 10(j), 29 U.S.C. § 160(j) (1965)

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Section 10(1), 29 U.S.C. § 160 (10) (1965)

(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(b) of this title, or section 158(e) of this title or section 158(b) (7) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should is-

sue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 158(b) (7) of this title if a charge against the employer under section 158(a) (2) of this title has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title.

ADDENDUM B

STATE STATUTES

NEBRASKA MASS PICKETING STATUTE,

Section 1, Neb. Rev. Stat. Section 28-812 (Reissue 1964)

28-812. Picketing, defined; unlawful. It shall be unlawful for any person or persons, singly or by conspiring together, to interfere, or to attempt to interfere, with any other person in the exercise of his or her lawful right to work, or right to enter upon or pursue any lawful employment he or she may desire, in any lawful occupation, self-employment, or business carried on in this state, by doing any of the following acts: (1) using profane, insulting, indecent, offensive, annoying, abusive or threatening language toward such person or any member of his or her immediate family, or in his, her or their presence or hearing, for the purpose of inducing or influencing, or attempting to induce or influence, such person to quit his or her employment, or to refrain from seeking or freely entering into employment, or by persisting in talking to or communicating in any manner with such person or members of his or her immediate family against his, her or their will, for such purpose; (2) following or intercepting such person from or to his work, from or to his home or lodging, or about the city, against the will of such person, for such purpose; (3) photographing such person against his will; (4) menacing, threatening, coercing, intimidating, or frightening, in any manner, such person for such purpose; (5) committing an assault or assault and battery upon such person for such purpose; or (6) loitering about, picketing or patrolling the place of work or residence of such person, or any street, alley, road, highway, or any other place, where such person may be, or in the vicinity thereof, for such purpose, against the will of such person.

Section 2, Neb. Rev. Stat. Section 28-814.02 (Reissue 1964)

28-814.02. Mass picketing; definition; display of sign required. (1) Mass picketing means any form of picketing in which there are more than two pickets at any one time within either fifty feet of any entrance to the premises being picketed or within fifty feet of any other picket or pickets, or in which pickets constitute an obstacle to the free ingress and egress to and from the premises being picketed or any other premises, or upon the public roads, streets, or highways, either by obstructing by their persons or by the placing of vehicles or other physical obstructions.

(2) Any person who shall legally picket by any means or methods other than forbidden in this section or in section 28-812 shall visibly display on his or her person a sign showing the name of the protesting organization he or she represents. The composition of the sign shall be upper case lettering of not less than two and one half inches in height.

Section 3, Neb. Rev. Stat. Section 28-814.03 (Reissue 1964)

28-814.03. Picketing; interference; unlawful; exception. It shall be unlawful for any person, acting separately or with others, to interfere with any picketing not described as mass picketing in section 28-814.02; Provided, this shall not apply to duly qualified law enforcement officers or to court action.

Section 4, Neb. Rev. Stat. Section 28-814.04 (Reissue 1964)

28-814.04. Picketing; intimidation; unlawful. It shall be unlawful under section 28-814.01 to 28-814.05. for any person, firm or corporation to intimidate or attempt to intimidate any striker by threat of the loss of any right or condition of employment, that directly or indirectly would affect the lawful conduct of said striker in any way.

Section 5, Neb. Rev. Stat. Section 28-814.05 (Reissue 1964)

28-814.05. Picketing; violation; penalty. Any person who shall violate any of the provisions of section 28-812 or sections 28-814.01 to 28-814.05 or who shall aid or abet in such violation shall be guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars, or imprisonment in the county jail for not more than three months, or by both such fine and imprisonment. Each violation shall constitute a separate offense.

